No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS-AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TEXAS STATE CONFERENCE OF THE NAACP IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The following *amici* submit this brief, with the consent of the parties, in support of Respondents' argument that the lower courts' decisions were correct in upholding the actions taken by Respondents.

Founded in 1909, the National Association for the Advancement of Colored People (hereinafter NAACP or the Association) is the nation's oldest and largest civil rights organization. The principal objectives of NAACP are to ensure the political, educational, social and economic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof.

The Texas State Conference of NAACP implements the mission of the Association at the state level or at other levels if requested by the national office. The fundamental goal of NAACP's education advocacy agenda is to ensure that all students have access to a quality, integrated public

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1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The parties have filed blanket consents with the Court consenting to the filing of all *amicus* briefs.

education. NAACP has been at the forefront of every major advance in ensuring integration at every level of the nation's public schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

Abigail Fisher (Petitioner or Ms. Fisher) was an applicant to the University of Texas (UT) at Austin in 2008. She was denied admission not because she was white, or because an African American student was preferred over her by reason of race. Rather, her high school class rank and her scores on standardized tests were too low to meet UT's standards for admission. Ignoring that crucial fact, she has persisted in this lawsuit, challenging one aspect of UT's admissions policy and claiming to be a victim of racial discrimination. UT, however, has no racial preference in its admissions process, and used no racial preference in denying Petitioner admission. Therefore, the admissions process caused her no injury. More than 90% of 10,200 admission slots available to Texas residents for the relevant term were awarded without any consideration of race. To have a chance at the remaining slots, an applicant of any race needed to have an academic index (AI) of 3.5 or higher. The AI was a calculation based upon the applicant's class rank and ACT/SAT scores. Petitioner's AI was only 3.1. In short, she was not qualified for admission to UT, and race played no part in her denial.

For an applicant who had an AI of at least 3.5, the applicant's personal achievement index (PAI) played a part in whether he or she was offered admission. PAI considers: scores on two essays; leadership; extracurricular activities; awards/honors; work experience; service to school or community; and seven special circumstances, only one

of which is the race of the applicant. Race is merely a fraction of one factor that admissions officers may consider when looking at an applicant as a unique individual. This consideration can positively impact applicants of all races, including white applicants. Petitioner's PAI, however, was irrelevant because her AI was not within the required range, and every applicant accepted whose race might have been considered by UT had an AI substantially higher than hers. Therefore, Petitioner suffered no injury in fact based upon any consideration of race, and no decision in this appeal can provide her any redress.

Under this Court's settled precedents, because Petitioner suffered no personal, particularized injury-in-fact, she has no standing to assert the interests of others who are hypothesized to have been harmed by UT's admissions practices. Accordingly, there is no Article III "Case" or "Controversy" to give the Court subject matter jurisdiction over her claim. The Court must address the absence of standing before it considers the merits of Petitioner's arguments.

UT demonstrated in the first appeal to this Court, and again in the Fifth Circuit after remand, that its minor consideration of race in college admissions furthered a compelling state interest: achieving a diverse student body. That interest is more compelling still when viewed in light of Texas's long history of state-sponsored discrimination in education, which has led to lack of diversity in public education at every level. Prior to 1955, the Texas Constitution expressly required segregated schools for white and African-American children. For many years thereafter, in violation of Title VI of the Civil Rights Act of 1964, Texas failed to eliminate the vestiges

of *de jure* segregation in public higher education and in all other levels of public education. Texas has failed to reach its goals of integrating the State's predominantly white colleges and universities, with the result that the proportion of African-American and Latino students at UT is far smaller than the percentage of African Americans and Latinos in the general Texas population. The resulting lack of diversity disadvantages students throughout Texas, regardless of any individual student's race. Any UT program to increase diversity must fight the contrary forces exerted by persisting *de facto* segregation in Texas's secondary education system. Indeed, the one partial remedy implemented by Texas that Petitioner does not challenge – the so-called Top Ten Plan that guarantees that admission to UT is offered to Texas residents graduating in the top 10% of their high school classes – has had a positive (albeit limited) impact on diversity at UT only because racial segregation in Texas public high schools remains so pervasive.

This Court remanded *Fisher I* to the Fifth Circuit for further consideration of whether UT's admissions program was narrowly tailored and thus constitutional. That court correctly found that UT had carried its burden on narrow tailoring. UT showed that its admissions program is constitutional because it is narrowly tailored to promote the compelling state interest of achieving diversity within a state institution of higher learning. Although race is a factor that may have a positive impact upon the consideration of those otherwise academically qualified, *i.e.*, persons unlike Ms. Fisher, UT's program considers race as only one factor among many, in the context of "truly individualized" evaluation of each applicant for admission to UT. UT's constitutionally permissible holistic

review process recognizes the simple truth that race is still relevant in American society, and that race may help shape and inform individual perspectives and experiences. Those perspectives and experiences, in turn, contribute to the mosaic of a rich and diverse university community. In contrast, Petitioner's view of diversity denies the individuality of each UT applicant, and lumps them into groups based solely upon their skin color. This view – that African Americans are fungible commodities devoid of individuality and distinct personal worth – is repugnant to our Constitution.

ARGUMENT

I. PETITIONER LACKS STANDING BECAUSE HER HIGH SCHOOL RANKING AND TEST SCORES PREVENTED HER FROM BEING ACCEPTED TO UT REGARDLESS OF HER RACE

The "elephant in the room" in this case is that no one – not even Petitioner – can credibly argue that race played any role in her not being offered admission to UT. She was unqualified for admission based on objective, measurable standards that did not consider race. Pursuant to Texas law, admission to UT was offered automatically to Texas residents graduating in the top 10% of their high school classes (the Top Ten Plan). Petitioner did not graduate in the top 10% of her high school class. Thus, she was not qualified to receive this automatic offer of admission. She does not challenge the constitutionality of the Top Ten Plan.

For applicants not in the top 10% of their high school classes, UT's admissions process contained multiple

steps, and unqualified applicants were mathematically eliminated at various stages. Petitioner's elimination would have occurred regardless of her race. For non-Top Ten Plan applicants, the UT admissions office established "A" group and "C" group parameters for some UT schools; these parameters were used to automatically admit, or presumptively deny, applicants based on their academic index (AI). JA 434a. The AI was derived from: (1) an applicant's predicated grade point average (PGPA), which includes ACT/SAT scores and high school class rank, and attempts to predict the applicant's freshman year grade point average for a particular academic program; and (2) any curriculum-based bonus points. JA 419a-420a. Race played no part whatsoever in the calculation of the AI. "A" group applicants had high AIs, and were offered admission to UT automatically on a rolling basis. JA 434a. Petitioner was not an "A" group applicant, thus, she again failed to qualify for automatic admission. Petitioner does not challenge UT's use of AIs in admissions determinations.

For Fall 2008, the relevant term, 92% of the 10,200 admissions slots available to Texas residents were awarded to Top Ten Plan applicants. JA 292a, JA 464a. A mere 841 freshman admission slots remained available for Texas residents for the Fall semester after accounting for all Top Ten Plan and "A" group applicants. JA 434a. Because of the limited number of slots, to qualify for admission, Petitioner's AI had to exceed 3.5. JA 465a-466a. Petitioner's AI, however, was only 3.1. JA 465a. Thus, Ms. Fisher was neither offered, nor qualified for, admission to UT. JA 465a-466a.

A party seeking to invoke the powers of a federal court must demonstrate throughout the litigation that

she has standing; otherwise, there is no Article III "Case" or "Controversy" that gives a federal court subject matter jurisdiction to decide a dispute. This requires the litigant to "prove that [s]he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013); *see also DOC v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999); *United States v. Hays*, 515 U.S. 737, 745-46 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977).

Petitioner's constitutional challenge is to UT's use of a Personal Achievement Index (PAI) in admissions. UT, however, did not rely upon a PAI in deciding not to admit Petitioner. The PAI had no effect unless an applicant's AI score exceeded 3.5, and Petitioner's AI score was 3.1. The simple truth is that she was denied admission because her high school class ranking and SAT/ACT scores fell below the threshold set by UT, and for no other reason. UT is a highly competitive school. Just as in the real world, not everyone gets a trophy regardless of how poorly they compete, and not everyone gets accepted to the college of her choice regardless of how low her class rank and test scores are.

On the face of this record, Petitioner suffered no concrete and particularized injury from UT's program. Her non-admission is not "fairly traceable" to UT's decision to choose among a large pool of more academically-qualified candidates, using race as one of many factors to consider. Finally, she has no standing to assert the interests of other candidates who allegedly were injured by UT's policies.

Petitioner's lack of standing deprives this Court of the ability to address Petitioner's challenge to the factors considered by UT in determining PAIs of non-parties. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 501 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.").

As stated above, it is UT's determination of an applicant's PAI, *i.e.*, a score that was irrelevant to UT's decision about Petitioner's admission, that is challenged in this case. An applicant's PAI is the result of a holistic review of everything submitted by an applicant, and takes into consideration, *inter alia*: the applicant's socioeconomic background; activities in which the applicant has been involved; the applicant's leadership potential as well as leadership achieved; any letters of recommendation; any work experience; and how the applicant spends his or her time outside of the classroom in volunteer activities. JA 218. As a UT admissions official who was a reader of applications testified, readers were aware of an applicant's race because it appeared on the application, but beyond that, due to the holistic approach taken by UT, it was "impossible to say" how any applicant's race impacted the applicant's PAI. JA 220a. "None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together." *Fisher*, 631 F.3d at 228. Moreover, race "can positively impact applicants of all races, including Caucasian[s]. . . ." *Id.* Put succinctly, UT's policy had no racial preference. In fact, a study of the entire population of

students who graduated from Texas high schools between 2000 and 2010 showed that whites were helped, rather than hurt, by the admissions program in place at UT.[2] Regardless, neither Petitioner's PAI nor the PAI of any other applicant played a part in her not being offered admission. Every non-Top Ten Plan applicant whose AI was below 3.5 was denied admission, regardless of race. Inversely, every non-Top Ten Plan applicant who was offered admission had an AI higher than that of Petitioner.

II. TEXAS'S LONG HISTORY OF STATE-SPONSORED DISCRIMINATION HAS RESULTED IN A LACK OF DIVERSITY IN PUBLIC EDUCATION

This Court held in *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) that context matters when reviewing race-based governmental action under the Equal Protection Clause. It is for the specific purpose of providing context to the admissions process under review by this Court that NAACP *amici* incorporate a discussion of the federal government's efforts to eradicate racial discrimination in the Texas public education system. Texas has a long history of racial discrimination in its public higher education and public elementary and secondary school systems.[3] That unfortunate history, vestiges of which

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2. C.M. Hamilton, Does Race Matter?: Black Student Access to Texas Public Institutions of Higher Education in the Context of Automatic Admission Laws and Race-Based Admissions Policies (August 10, 2012), found at https://repositories.lib.utexas.edu/bitstream/handle/2152/22146/Hamilton_Dissertation_20126.pdf?sequence=1.

3. Lupe S. Salinas & Robert H. Kimball *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 Geo. J. on Poverty L. & Pol'y 215 (2007).

exist to this very day, has resulted in a lack of racial and ethnic diversity at the collegiate level that disadvantages every Texas student who must live in the multi-cultural, heterogeneous real world that exists now and will exist in the future. This absence of diversity informs and gives context to UT's challenged admissions process.

Following this Court's decision in *Brown v. Board of Education* and the enactment ten years later of the Civil Rights Act of 1964, the Department of Health, Education and Welfare (HEW) assumed responsibility for enforcement of Title VI of that legislation, which prohibits racial discrimination in state programs (including education programs) receiving federal financial assistance.[4] In 1969, black students were still facing a wall of state-sponsored discrimination despite the mandate of Title VI, and HEW, through its Office of Civil Rights (OCR), determined that ten Southern states were operating dual systems of higher education in violation of Title VI.[5] Nevertheless, HEW took no administrative enforcement actions and referred no states to the U.S. Department of Justice (DOJ) for litigation, preferring to follow an approach of voluntary negotiation and consensus in achieving desegregation.[6]

In 1970, parents of school-age children filed *Adams v. Richardson*, 351 F. Supp. 636 (D.D.C. 1972), *modified and*

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4. Exec. Order No. 11,247, 30 C.F.R. 12327 (1965), *reprinted in* 42 U.S.C. § 2000d-1 (1976). President Lyndon Johnson directed the Attorney General to coordinate enforcement of Title VI and directed each department to cooperate in the enforcement.

5. *Adams v. Richardson*, 351 F. Supp. 636, 637-38 (D.D.C. 1972).

6. *Id.* at 638.

aff'd, 480 F.2d 1159 (D.C. Cir. 1973), against the Secretary of HEW. This action charged that HEW had failed to enforce Title VI in state colleges and universities. The District Court found that between January 1969 and February 1970, HEW concluded that ten states were operating segregated systems of higher education in violation of Title VI. Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland, and Virginia were the states in question, and are known as the original *Adams* states.

The District Court ruled that HEW had abused its discretionary authority under Title VI, and ordered the ten states to file plans for desegregating their public colleges and universities. For several years, HEW and the states bickered about the adequacy and appropriateness of the various plans.[7] In April 1977, the District of Columbia Circuit, in *Adams v. Califano*, 430 F. Supp. 118 (D.C. Cir. 1977), ordered HEW to publish criteria specifying the ingredients of acceptable plans to desegregate systems of public higher education. "These criteria require states to create a unitary system out of the present racially unbalanced, dual system, and to desegregate student enrollment, academic and non-academic personnel, and administrative and governing boards in each institution."[8]

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7. DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW, 459 n.10 (6th ed. 2008).

8. *Id.* The responsibility for conducting this Title VI review was transferred to the U.S. Department of Education by authority of the Department of Education Organization Act, 20 U.S.C. Section 3441 (1980).

Although Texas was not an original *Adams* state, and thus was not subject to the *Adams* court's original order, as a result of Texas's status as a state that had historically maintained a segregated public education system, the Court entered an unpublished supplemental order that directed HEW to include Texas in its enforcement proceedings.[9] During the Spring of 1978 and the Summer of 1979, OCR staff in HEW conducted a statewide review of higher education in Texas.[10] OCR concluded in 1981 that Texas had failed to eliminate the vestiges of its former *de jure* segregation in public higher education.[11] Because vestiges of that dual system still existed, OCR found that the State's public higher education system was not in compliance with Title VI.[12] OCR specifically noted that the racial composition of student enrollments, faculties, staffs, and governing boards continued to reflect the racial identity assigned by law to Texas public institutions prior to 1954.[13] In response, Texas made

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9. *Hopwood v. Texas*, 861 F. Supp. 551, 555-56 (W.D. Tex. 1994).

10. Victor Goode, *Texas Plan: Public Law School Education, Title VI, and the Settlement Monitoring Process*, 12 S.U. L. Rev. 157, 171 (1985-1986) (citing a letter from Cynthia Brown, Assistant Secretary for Civil Rights, Department of Education, to Mark White, Texas Attorney General (Jan. 15, 1981) (discussing compliance by Texas with Title VI) (hereinafter cited as "Brown Letter")).

11. *Id.*

12. *Id.*

13. *Id.* OCR also noted that additional vestiges of the formerly dual system were evident in inequities in resource allocations to traditionally black and traditionally white schools (such as resources for physical facilities and for faculty salaries) and the duplication of programs between traditionally black

commitments to OCR which, in turn, granted provisional approval to a Texas statewide desegregation plan.[14]

Meanwhile, throughout the 1980s, many black and Hispanic students in Texas lived in school districts that courts and the DOJ had determined were unconstitutionally segregated.[15] More than 70% of blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans.[16] Continued state resistance to integration of public schools in Texas resulted in numerous lawsuits and court-imposed desegregation plans throughout the state in the 1980s and 1990s.[17]

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institutions and traditionally white institutions sharing service areas. *Id.* at 2.

14. Letter from Mark White to Cynthia Brown (Jan. 14, 1981) (discussing compliance by Texas with Title VI).

15. *Hopwood v. State of Tex.*, 861 F. Supp. 551, 554 (W.D. Tex. 1994); See e.g. *Hous. Indep. Sch. Dist. v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960); *Borders v. Rippy*, 247 F.2d 268 (5th Cir. 1957); *U.S. v. Texas Ed. Agency*, 467 F.2d 848 (5th Cir. 1972); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962), *aff'd*, 313 F.2d 284 (5th Cir. 1963); *U.S. v. State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971).

16. *Cheryl J. HOPWOOD, Plaintiff-Appellant-Cross-Appellee, v. STATE OF TEXAS, et al.*, Brief of the State of Texas 1999 WL 33619061, (5th Cir. April 20, 1999).

17. *Hopwood v. State of Texas*, 861 F. Supp. 551, 556 (W.D. Tex. 1994). In fact, in May 1994, when Petitioner was in elementary school, desegregation lawsuits were pending against more than forty Texas school districts.

In March 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI enforcement suit, finding that "Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI."[18] The court ordered DOE to begin enforcement proceedings against Texas unless Texas submitted a plan that fully complied with Title VI within forty-five days.[19] OCR provided Texas with a list of thirty-seven steps that would improve the Texas Plan, including the consideration of an applicant's complete record in admission decisions and the selection of "[minority] students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements."[20] Texas amended its plan to address the deficiencies identified by OCR.[21] In June 1983, OCR accepted the Texas Plan as being in compliance with Title VI.[22] The revised Texas Plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates

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18. *Id.*

19. *Id.*

20. *Id.*; Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

21. *Hopwood v. Texas*, 861 F. Supp. 551, 556 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *abrogated* by *Grutter v. Bollinger*, 539 U.S. 306 (2003); Scanlan, Laura C., *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. Rev. 1580, 1596-97 (1996).

22. *Hopwood*, 861 F. Supp. at 556.

from undergraduate institutions in the State who enter such programs."[23] The Texas Plan was subject to monitoring for compliance until 1988.[24] In 1988, the Texas Higher Education Coordinating Board (the "Board") officials evaluated the results of the Texas Plan and determined that Texas had not met the goals and objectives of the plan.[25] As a result, the Board developed and adopted a successor plan (Plan II) to avoid a mandate from the federal government to negotiate a second plan.[26] Plan II did not contain any specific numeric enrollment goals, but stated a commitment to increase black and Hispanic student enrollment.[27] Plan II was effective from September 1989 to August 1994.[28] OCR continued to monitor the Texas system to determine whether the vestiges of *de jure* segregation had been eliminated, in light of *United States v. Fordice*, 505 U.S. 717 (1992). *Hopwood*, 861 F. Supp. at 557.

In 1996, however, the state's ongoing efforts to address the continuing *de facto* segregation in its institutions of higher education came to a halt as a result of the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, four white plaintiffs who had been rejected from The University of Texas School of Law challenged the institution's admissions policy on equal protection grounds

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23. *Id.* at 556 n.30.

24. *Id.* at 556.

25. *Id.* at 557.

26. *Id.*

27. *Id.*

28. *Id.*

and prevailed.[29] The Fifth Circuit in *Hopwood* rejected the history of segregation recited in the district court opinion and declared the use of race-conscious criteria in admissions decisions at UT's law school to be unconstitutional.[30] Following the *Hopwood* decision, the Texas Attorney General issued an opinion prohibiting the use of race as a factor in admissions by any undergraduate or graduate program in Texas state higher education. *See Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 222 (5th Cir. 2011). Thereafter, Texas institutions of higher education ceased all race-conscious admissions policies, and racial diversity declined at UT and other state colleges and universities.

The Texas Legislature thereafter enacted as law the Top Ten Plan.[31] The law altered UT's preexisting admissions policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.[32] The law, however, did not succeed in stemming the tide of declining enrollment of racial minorities at UT. African–American enrollment for 1997 dropped almost 40% from the 1995 level (from 309 to 190 entering freshmen), while Latino enrollment decreased by 5% (from 935 to 892 entering freshmen).[33] In 1999, the Houston Chronicle reported that black students made up only three percent of overall enrollment at Texas colleges,

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29. 78 F.3d 932 (5th Cir. 1996).

30. *Id.*; Chang, Robert S. and Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 Wm. & Mary Bill Rts. J. 229, 259 (1997).

31. *Fisher*, 631 F.3d at 224.

32. *Id.*

33. *Id.*

with 32 percent of those students attending historically black colleges.[34] Moreover, black students made up less than five percent at more than half of the majority-white colleges.[35]

In 2000, just eight years prior to Petitioner's seeking admission to UT, OCR again found that "the racial identifiability of the State's higher education institutions continued to reflect their former *de jure* segregated status."[36] On May 11, 2000, Governor Bush and OCR officials signed the "Texas Commitment" that would form the basis for the state's implementation plan "to address issues of concern identified to the State regarding its higher education system, consistent with Title VI of the Civil Rights Act of 1964 and *United States v. Fordice*, 505 U.S. 717 (1992)."[37] The "Texas Commitment" consisted of five areas of focused action, and one of the five areas was to "improve the recruitment, retention, and participation rates of African-American and Hispanic students at the State's historically white institutions."[38] Following the "Texas Commitment," the State developed the Closing the Gaps by 2015 Plan. Texas has submitted progress reports every year since reporting began in 2003 regarding its progress in meeting the goals outlined in the Closing the Gaps by 2015 Plan.

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34. Lydia Lum, *Duplication at UH, TSU Seen Impeding Diversity*, Houston Chron., Nov. 10, 1999.

35. *Id.*

36. Letter from OCR to Mr. Clay Johnson, Office of the Governor (October 11, 2000) (on file with the *amici*).

37. Letter from OCR, Taylor D. August, to the Office of the Governor, (May 23, 2000) (on file with the *amici*).

38. *Texas Commitment*, George W. Bush and Office of Civil Rights 3 (May 11, 2000).

Despite the efforts described above, the UT Fall 2014 freshman class had only 3.8% black students and 19% Latino students. Should the 2014 freshman class choose to stay in Texas after graduating, the world outside their Austin campus will be a stark change to the world they knew. In 2014, the U.S. Census Bureau estimated that Texas's overall population was 12.5% black, 4.% Asian, 38.5% Latino, and 43.5% white. Thus, despite its efforts at improving racial and ethnic diversity, UT still is not preparing its students for the real-world diversity they will face post-graduation, nor is it providing them with the educational benefits that flow from a truly diverse student body.

III. THE STATE HAS SATISFIED THE NARROW TAILORING REQUIREMENT

In 2003, just five years before Petitioner sought to enter UT, this Court in *Grutter* warned that strict scrutiny of racial classifications under the Equal Protection Clause must not be "strict in theory, but fatal in fact." 539 U.S. at 326. The Court reiterated that remedying past discrimination is not the only constitutionally permissible use of race. The Court held that race may be taken into account in attempting to promote diversity within a student body, and noted that "the benefits [of a diverse campus] are not theoretical, but real, [...] and can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. Reaffirming these truths, this Court in *Fisher I* held that diversity can be a compelling state interest justifying consideration of race in the post-secondary education context, but it cautioned that the means used to achieve that diversity must be subjected to close examination. Such an examination reveals that UT's limited and individualized consideration of race during its holistic review process is permissible under this Court's precedents.

UT's consideration of race represents an attempt to identify qualified ***individuals*** who it believes will make unique contributions to the university community. It represents an acknowledgment that, while race is still relevant in American society, individuals sharing the same skin color may have vastly different perspectives based on different experiences. It acknowledges that the broad sweep of the Top Ten Plan may be insufficient to ensure the scope and depth of diversity that is desired by the university.

UT's program withstands strict constitutional scrutiny because it was adopted after careful consideration, and is narrowly tailored to accomplish the state's compelling interest of ensuring true diversity within UT's student body. Petitioner's argument distorts the holding of *Grutter* by ignoring the benefits of individualized consideration of race. Her view of diversity effectively treats all black people as clones, sharing identical ideas and viewpoints solely by virtue of their race. This is self-evidently false. Petitioner's argument would deny UT the opportunity to consider the character, achievement, history and personality of candidates who, although more academically qualified than Petitioner, cannot qualify under the Top Ten Plan. It takes the cynical and false view that a white UT student's exposure to one African-American is the same as exposure to any other African-American. It also entrenches the *de facto* segregation which has persisted in Texas lower schools for three generations after the end of *de jure* segregation. This Court should not allow its holding in *Grutter* to be perverted in such a way.

UT's desire and procedure to diversify its campus is sufficiently similar to that of Michigan's Law School and Harvard College, both of which this Court has deemed

constitutionally permissible. Harvard admitted its first black student in 1836, almost 45 years before the UT opened its doors.[39] Though the nation's first college, and those that followed, initially restricted black student attendance, the end of their discriminatory policy in Cambridge came well before the Civil War and the enactments Reconstruction Amendments. Despite more than a century of black student admission, in the 1940s, Harvard still found that too few black Americans were admitted to one of the world's most renowned institutions. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 321 (1978) (Appendix to the Opinion of Powell, J.). In pertinent part, the admissions committee at Harvard determined it insufficient to have diversity based on applicants' geographic, socioeconomic status, or professional achievements of the applicant's parents, but not race or ethnicity. Thus, Harvard sought to develop a means to use race as a factor among many to increase the diversity among its elite student body. *Id.*

Similar to UT's more recent progression on the benefits of diversity, Harvard concluded that "10 or 20 black students could not begin to bring their classmates ***and to each other*** the variety of points of view, backgrounds and experiences of blacks in the United States." *Id.* (emphasis added).

Contrary to the position now espoused by Petitioner, Justice Powell concluded nearly 40 years ago that "critical criteria are often individual qualities or experience not

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39. Beverley Williams was admitted to Harvard College in 1836; however, he died before enrolling into the school. Richard Greener was the first black student to matriculate and graduate from Harvard College in 1870.

dependent upon race, but sometimes associated with it." *Id.* at 324. Put succinctly, diversity of thought and experience is found within and outside of racial and ethnic groups, and it is this diversity that UT seeks to identify through its holistic review process.

As explained in *Grutter*, a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. *Grutter*, 539 U.S. at 334. *Grutter* requires four key elements of narrow-tailoring: 1. No racial quota; 2. Individual consideration; 3. Serious, good faith efforts at race-neutral alternatives; and 4. Time-limited plans. *Id.* at 334-36, 341-42.

In this case, the Fifth Circuit, on remand from this Court, addressed each of these elements of narrow-tailoring.

Necessity and Racial Neutral Alternatives

Narrow tailoring requires that the Court verify that it is necessary for a university to use race to achieve the educational benefits of diversity. *Fisher v. University of Texas*, 758 F.3d 633, 644 (5th Cir. 2014). As this Court stated in *Grutter*, however, a university need not exhaust all potential race-neutral options. *Grutter*, 539 U.S. at 339. It simply requires "good faith consideration of workable race-neutral alternatives..." *Id.* The Court should continue its long-standing presumption that educational authorities act in good faith, and that given the historical and current landscape in Texas, admissions officers may continue to use race as one of many factors in furthering the compelling interest of student diversity.

Furthermore, the evidence dictates that UT's approach to achieving its educational objective of increased diversity was necessary. The Fifth Circuit provided an exhaustive analysis of how UT did not stop with the Top Ten Plan in its effort to exhaust racially neutral alternatives to achieving diversity. The record shows that UT implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits more than 80% of the student body with no facial use of race at all. *Id.* at 649. Still, with each entering class, there was a gap between the lower standardized test scores of students admitted under the Top Ten Plan and the higher scores of those admitted under holistic review. These gaps corresponded, once again, to the persistent effects of school segregation in Texas, where more than half of Latino students and 40% of black students attend a school with 90% to 100% minority enrollment. *Id.* at 650. If race were not given some consideration in holistic review, the non-Top Ten Plan applicants admitted to UT would be nearly all-white, resulting in an even less diverse student body. *Id.* at 648. While the Top Ten Plan boosted minority enrollment by skimming from the tops of Texas high schools, it did so against a backdrop of increasing resegregation in Texas public schools. In reviewing UT's admissions policy, the Court should keep in mind that Texas is one state, and that the UT applicants at issue are those who are continuing their educations in a single Texas system that includes elementary, secondary, and higher education. UT is the top point of an education system that is replete with racial segregation. This racial segregation has proven to have an impact on both the funding for, and the quality of, education received by UT applicants.

Today in Texas, African-Americans have a poverty rate of 25.8%, as compared to 23.3% for Latinos, and 8.8% for whites.[40] In 2011, Texas cut K-12 funding by $5.4 billion, and more than 600 school districts filed cases claiming the funding system had become inequitable, inadequate, and unconstitutional. In *Williams v. Tex. Taxpayer & Student Fairness Coal.*, No. 14-0776, 2015 BL 16475 (Tex. Jan. 23, 2015), the court noted: "The Texas Supreme Court in [*Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 790 (Tex. 2005)] acknowledged wide performance gaps among student groups based on race and economic status. . . . Today, nearly a decade later, these gaps have persisted and even increased (as the State raised the bar for students but failed to maintain and improve the State's funding structure). The result is that these children are being denied reasonable access and opportunity to a quality education."[41] It is "these children" who later will become applicants to UT.

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40. DOJ Request for Judicial Notice, *Texas v. Holder*, Civil Action No. 12-cv-128 (DST, RMS, RLW), ECF 219 available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/RequestforJudicialNotice.pdf.

41. The phenomenon in Texas is repeated throughout the United States. Schools in urban ghettos are significantly underfunded compared to schools in wealthier neighborhoods. Orfield, G., & Lee, C. (2005). *Why segregation matters: Poverty and educational inequality*. Cambridge, Mass.: Civil Rights Project, Harvard University. These schools also have less experienced teachers, and students who attend these schools are less likely to enroll in college. *Id.*; Orfield, G. (1993), *The growth of segregation in American schools: changing patterns of separation and poverty since 1968; a report of the Harvard Project on School Desegregation to the National School Boards Association*. Alexandria, Va.: National School Boards Association, Council of Urban Boards of Education.

Consequently, an admissions system whose diversity was wholly dependent on the Top Ten Plan would set in concrete a caste system in which black and Latino UT students likely would be the products of underfunded and underperforming Texas high schools, while white UT students would likely be derived from better funded and better performing high schools. Petitioner argues that this dichotomy of students is the only diversity constitutionally permissible. That conclusion is plainly not compelled by the precedent established in *Grutter*. To carry out the compelling interest of diversity under *Grutter*, UT may permissibly decide that the Top Ten Plan is unable to produce a student body that is sufficiently diverse. It may permissibly bring individuals to the UT campus who, while of the same race, also have varied socio-economic backgrounds, experiences, and viewpoints.

No Racial Quota

Unable to find a racial quota in UT's admissions policy, Petitioner attempts to manufacture one. The Fifth Circuit, howver, properly rejected Petitioner's attempt to quantify "critical mass" as a rigid numerical goal. *Fisher*, 758 at 654. While UT considers numbers of students of a particular race to be relevant, it does not consider the number of students from different racial groups to be its measure of success. The goals of UT's programs are not captured by population ratios. The Fifth Circuit was persuaded of this, mindful that by 2011, the majority of Texas high school graduates were from minority groups. *Id.* Indeed, if strict quotas were in place, UT might have already a student body that, from a strictly racial viewpoint, more accurately reflected the population of Texas.

Individual Consideration

UT's holistic review program sought to admit minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills. The Fifth Circuit found that a variety of perspectives, that is, differences in life experiences, is a distinct and valued element of diversity. *Id.* at 653. Admission via the holistic review program—overwhelmingly of white students—is a highly competitive process for minorities and non-minorities alike. *Id.* at 657. Although all applicants admitted would have the threshold AIs, the holistic review allows UT to offer admission to applicants who otherwise might be missed—for example, applicants with special talents and experiences, including minority applicants with the experience of attending an integrated school with better educational resources. *Id.* at 656. UT's holistic view takes into account that, although a person's race undoubtedly affects how she views the world around her, it does not wholly define who she is. Indeed, Petitioner certainly does not, and cannot reasonably, argue that because she is white, her viewpoints and ideas are synonymous with every other white applicant to UT for the relevant term.

Time Limits

As the Fifth Circuit observed, the public record of data since 2008 confirms that UT's race-conscious holistic review program has a self-limiting nature, one that complements UT's periodic review of the program's necessity to ensure it is limited in time. *Id.* at 655. Acceptance of Petitioner's arguments, however, would gut the ability of UT and other institutions of higher

learning to achieve the compelling interest of creating and maintaining diverse student bodies. "[T]o reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing." *Id.* at 660.

CONCLUSION

Ms. Fisher was denied admission to UT, not because of her race, but because her high school class rank and standardized test scores objectively were just too low. Every single applicant whose race might have played a part in UT's admissions process had a higher AI (combination of class rank and test scores) than Petitioner had. Ms. Fisher does not challenge the portions of UT's admissions policy that resulted in her being mathematically eliminated from being offered admission regardless of her race. Accordingly, she has not suffered an injury in fact traceable to any segment of UT's admissions policy that considered her race or the race of any other applicant. Because this Court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party, the Court should not reach the merits of Ms. Fisher's claim. Furthermore, UT's admissions policy has no racial preference and must be considered in the context, and against the backdrop, of Texas's long history of state-sponsored discrimination, and the continued racial segregation of Texas public school students which has resulted in a demonstrable lack of diversity at UT. UT's admissions program is constitutionally valid because it is narrowly tailored to advance the constitutionally permissible compelling interest of ensuring true diversity within UT's student

body. Petitioner's arguments are dependent upon a perception that all persons of any particular race are identical in viewpoint and ideas, and are thus fungible with all others of that race. Such a position should never be the law of the land. For these reasons, *amici* urge the Court to uphold the lower court rulings.

Respectfully submitted

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